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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1930

No. 549

NASH-BREYER MOTOR COMPANY, FORMERLY TROY MOTOR SALES COMPANY, PETITIONER,

vs.

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 15, 1930

CERTIORARI GRANTED JANUARY 5, 1931

(35,471)

( )

SUPREME COURT OF THE UNITED STATES

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vs.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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BEFORE U. S. BOARD OF TAX APPEALS

Docket No. 9345

NASH-BREYER MOTOR CO., Formerly Troy Motor Sales Company, 1056 Figueroa Street, Los Angeles, Calif.,

vs.

COMMISSIONER OF INTERNAL REVENUE

For Taxpayer: Theo. B. Benson, Esq.
For Commissioner: J. F. Greaney, Esq., E. C. Lake, Esq., Brooks Fullerton, Esq.

DOCKET ENTRIES

1925.

Nov. 23. Petition received and filed.
" 25. Copy of petition served on Solicitor.
" 25. Notification of receipt mailed taxpayer.
Dec. 17. Answer filed by Solicitor.

1926.

Jan. 5. Copy of answer served on taxpayer—assigned to General Calendar.
Dec. 7. Hearing date set 2-7-27.

1927.

Feb. 2. Motion to transfer to Circuit Calendar filed by taxpayer.
" 5. Granted—Both sides notified.
May 11. Hearing date set 6-21-27 Los Angeles, Calif.
" 14. Motion to restore to day calendar filed by tax-
[fol. 2] payer.
May 14. Motion to amend petition and consolidate for hearing with Docket #11678 filed by taxpayer. Amendment tendered.
" 17. Granted. Both sides notified.
" 17. Motion to restore to day calendar, granted. Both sides notified.
" 20. Copy of amended petition served on G. C.
" 31. Answer to amended petition filed by G. C. Copy served 6/6/27.

1927.

June 13. Notice of appearance of B. Benson attorney for taxpayer.

" 13. Notice of withdrawal of Harry Schwartz as counsel for taxpayer, filed.

" 30. Application for order to take deposition—filed by taxpayer.

July 13. Order to take depositions of W. A. Sellman, et al., signed and filed. Both sides notified.

Aug. 22. Depositions of W. A. Sellman, et al., filed. Copy served.

" 23. Copy of deposition served on G. C.

Oct. 31. Application to take depositions on written interrogatories, filed by taxpayer.

Nov. 8. Objections to written interrogatories and cross-interrogatories filed by G. C.

" 9. Motion to withdraw application for order to take depositions filed by taxpayer.

" 10. Order vacating and cancelling order to take depositions, signed and filed. Both sides no-
[fol. 3] tified.

Nov. 9. Order to take depositions of John J. Troy signed and filed. Both sides notified.

1928.

Feb. 17. Hearing date set 3-19-28.

Mar. 8. Application for subpœna (Comm.) filed by taxpayer.

Mar. 8. Subpœna duces tecum issued. Subpœna duces tecum served 3-8-28.

" 19. Hearing had before Mr. Trammell on merits. Submitted. Briefs due in 60 days.

" 23. Transcript of hearing of 3-19-28 filed.

May 16. Motion for a 45 day extension to file brief filed by taxpayer.

" 17. Motion for extension to 7-2-28 to file briefs, filed by G. C. Granted 5-18-28.

" 17. Motion granted to July 1, 1928.

June 23. Motion for extension to Aug. 1, 1928 to file briefs filed by G. C. Granted 6-25-28.

July 31. Proposed findings and brief filed by taxpayer.

Aug. 1. Brief filed by G. C.

Nov. 15. Motion to file supplemental brief filed by G. C. Supplement tendered. Denied 11-16-28.

1928.

Dec. 4. Findings of fact and opinion rendered. Mr. Trammell. Judgment will be entered under Rule 50.

" 10. Motion for redetermination filed by G. C.

" 15. Notice of settlement filed by G. C. Copy served 12-19-28.

" 15. Hearing set Jan. 9, 1929.

[fol. 4]

1929.

Jan. 9. Order granting rehearing on Feb. 6, 1929, but limited to questions of the statute of limitations, entered.

" 9. Motion for reconsideration filed by taxpayer.

" 29. Order placing proceeding on calendar for hearing Jan. 31, 1929, entered.

" 31. Hearing had before Mr. Trammell. Submitted.

Feb. 5. Transcript of hearing of Jan. 31, 1929, filed.

" 7. Order denying motion for modification of decision and opinion and decision to stand as rendered, entered.

Jan. 9. Hearing had before Mr. Trammell on settlement under Rule 50. Motion for rehearing granted and limited to statute of limitations.

Mar. 16. Order of redetermination entered.

June 18. Motion to change name of petitioner to Nash-Breyer Motor Co., etc., filed by taxpayer.

" 20. Order changing title to read "Nash-Breyer Moto Co.," etc., entered.

July 29. Supersedeas bond for $27,258.26 approved and ordered filed.

Aug. 2. Stipulation of venue filed—United States Circuit Court of Appeals (2).

" 2. Petition for review by United States Circuit Court of Appeals (2) with assignments of error filed by taxpayer.

" 2. Proof of service filed.

[fol. 5]

Sept. 26. Motion for 30 days extension to prepare and deliver evidence—filed by taxpayer.

" 30. Order enlarging time for preparation of evidence and delivery of record papers to 11-1-29, entered.

1929.

Oct. 29. Agreed motion for 30 days extension to complete statement of evidence, filed.
" 31. Order enlarging time to Dec. 2, 1929, for preparation of evidence and delivery of record papers, entered.
Nov. 27. Agreed præcipe filed.
" 27. Agreed statement of evidence lodged.
" 29. Agreed statement of evidence approved and ordered filed.
Dec. 2. Order enlarging time for transmission and delivery of record papers to Dec. 20, 1929, entered.

Now, December 5, 1929, the foregoing docket entries certified from the record as a true copy.

B. D. Gamble, Clerk U. S. Board of Tax Appeals.
(Seal.)

[fol. 6] BEFORE U. S. BOARD OF TAX APPEALS

Docket No. 11678

NASH-BREYER MOTOR CO., formerly Troy Motor Sales Company, 1056 Figueroa Street, Los Angeles, Calif.,

vs.

COMMISSIONER OF INTERNAL REVENUE

For Taxpayer: Theo. B. Benson, Esq.
For Commissioner: J.F. Greaney, Esq., E. C. Lake, Esq.

DOCKET ENTRIES

1926.

Feb. 6. Petition received and filed.
" 10. Copy of petition served on Solicitor.
" 10. Notification of receipt mailed taxpayer.
Mar. 27. Answer filed by Solicitor.
Apr. 2. Copy of answer served on taxpayer—Assigned to general calendar.
June 19. Withdrawal of Harry Schwartz and substitution of T. B. Benson as counsel filed.

1927.

May 14. Motion to restore to day calendar filed by taxpayer. See 9345.

" 14. Motion to amend petition and consolidate for hearing with Docket #9345 filed by taxpayer.

[fol. 7] Amendment tendered.

May 17. Granted. Both sides notified.

" 17. Motion to restore to day calendar granted. Both sides notified.

" 20. Copy of amended petition served on G. C.

" 31. Answer to amended petition filed by G. C. Copy served 6-6-27.

June 13. Notice appearance T. B. Benson attorney for taxpayer filed. See 9345.

" 30. Application for Order to take Deposition—filed by taxpayer.

July 13. Order to take depositions signed and filed. Both sides notified.

Aug. 22. Depositions of W. A. Sellman, et al., filed. Copy served. See 9345.

" 23. Copy of depositions served on G. C.

Oct. 31. Application to take depositions on written interrogatories filed by taxpayer.

Nov. 8. Objections to written interrogatories and cross interrogatories filed by G. C. See 9345.

" 9. Motion to withdraw application for order to take depositions, filed by taxpayer.

" 9. Order to take depositions of J. J. Troy signed and filed. Both sides notified.

" 10. Order vacating and cancelling order to take depositions signed and filed. Both sides notified.

1928.

Feb. 17. Hearing date set 3-19-28.

Mar. 8. Application for subpœna (Comm.) filed by tax-

[fol. 8] payer. See 9345.

Mar. 8. Subpœna duces tecum issued. Subpœna served.

" 19. Hearing had before Mr. Trammell on merits. Submitted. Briefs due in 60 days.

" 23. Transcript of hearing of 3-19-28, filed.

May 16. Motion for a 45 day etxension to file brief, filed by taxpayer. See 9345.

1928..

May 17. Motion granted to July 1, 1928.

" 17. Motion for extension to 7-2-28 to file briefs filed by G. C. See 9345.

" 18. Motion granted.

June 23. Motion for extension to Aug. 1, 1928, to file briefs, filed by G. C. See 9345.

" 25. Motion granted.

July 31. Proposed findings and brief, filed by taxpayer. See 9345.

Aug. 1. Brief filed by G. C.

Nov. 15. Motion to file supplemental brief filed by G. C., supplement tendered. See 9345.

" 16. Motion denied.

Dec. 4. Findings of fact and opinion rendered. Mr. Trammell. Judgment will be entered under Rule 50.

" 10. Motion for redetermination, filed by G. C. See 9345.

" 15. Notice of settlement filed by G. C. Copy served 12-19-28.

" 15. Hearing set Jan. 9, 1929.

1929.

Jan. 9. Hearing had before Mr. Trammell. Motion for rehearing granted. Limited to statute of limi-

[fol. 9] tations.

Jan. 9. Order granting rehearing Feb. 6, 1929, but limited to the questions of the statute of limitations, entered.

" 9. Motion for reconsideration filed by taxpayer. See 9345.

" 29. Order placing proceeding on calendar for hearing Jan. 31, 1929, entered.

" 31. Hearing had before Mr. Trammell. Submitted.

Feb. 5. Transcript of hearing of Jan. 31, 1929, filed.

" 7. Order denying motion for modification of the decision and opinion, and said decision and opinion to stand as rendered, entered.

Mar. 16. Order of redetermination, entered.

June 18. Motion to change name of petitioner to Nash-Breyer Motor Co., etc., filed by taxpayer. See 9345.

" 20. Order amending title to read "Nash-Breyer Motor Co., etc." entered. See 9345.

1929.

July 29. Supersedeas bond for $27,258.26 approved and ordered filed.

Aug. 2. Stipulation of venue filed. United States Circuit Court of Appeals (2).

" 2. Petition for review by United States Circuit Court of Appeals (2) with assignments of error filed by taxpayer.

" 2. Proof of service filed.

Sept. 26. Motion for 30 day additional to prepare and de-
[fol. 10] liver record, filed by taxpayer. See 9345.

Sept. 30. Order enlarging time to Nov. 1, 1929, for preparation of evidence and delivery of record papers, entered.

Oct. 29. Agreed motion for extension of 30 days from Nov. 1, 1929, to complete Statement of Evidence, filed.

" 31. Order enlarging time to Dec. 2, 1929, for preparation of evidence and delivery of record papers, entered.

Nov. 27. Agreed præcipe filed. See 9345.

" 27. Agreed statement of evidence lodged. See 9345.

" 29. Agreed statement of evidence approved and ordered filed. See 9345.

Dec. 2. Order enlarging time to Dec. 20, 1929, for filing certified copies of record papers, entered.

Now, December 5, 1929, the foregoing docket entries certified from the record as a true copy.

B. D. Gamble, Clerk U. S. Board of Tax Appeals.
(Seal.)

[fol. 11] BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 9345

[Title omitted]

PETITION—Filed November 23, 1925

The above-named taxpayer hereby appeals from the determination of the Commissioner of Internal Revenue set forth in his deficiency letter, bearing symbols IT:E:SM:-

ACM D-24756-60D, dated September 25, 1925, and as the basis of its appeal sets forth the following:

1. The taxpayer is a California corporation with principal offices in Los Angeles, California.

2. The deficiency letter, a copy of which is attached hereto and marked Exhibit "A", was mailed to the taxpayer on September 25, 1925, and pursuant to instructions contained therein, the taxpayer's appeal to this Board has been perfected within a period of sixty days, as provided by the Revenue Act of 1924.

3. The taxes in question are corporation income and excess profits taxes for the fiscal year ended June 30, 1921; [fol. 12] the amount of the deficiency asserted against the taxpayer is $6,139.88, and the amount in controversy is the full amount of the deficiency.

4. The determination of tax contained in the said deficiency letter is based on the following error:

The Commissioner of Internal Revenue erroneously refused to allow the amount of the excess profits tax to be determined under the provisions of Sections 327 and 328 of the Revenue Acts of 1918 and 1921.

5. The facts on which the taxpayer relies as the basis of its appeal are as follows:

The actual amount of invested capital used for the determination of excess profits tax in the said deficiency letter is exceedingly small and disproportionate to that employed by representative corporations engaged in a similar business.

The taxpayer was a party to a contract with the Nash Motor Company under which it was given an exclusive territorial agency for the sale of cars, which contract although highly productive of income, was not included in invested capital by the Commissioner.

Due to a special financial arrangement, the corporation was given an unusually large credit, which enabled it to transact a large volume of business on a small invested capital.

A great proportion of the income received by the taxpayer was derived from commissions received on a brokerage basis.

[fol. 13] The Commissioner of Internal Revenue has recognized the above mentioned abnormalities of income and invested capital for prior years and has granted special relief for said prior years.

The taxpayer in support of its appeal relies on the following proposition of law:

Where the invested capital or income of a taxpayer is abnormal within the meaning of Section 327 of the Revenue Acts of 1918 and 1921, as disclosed by facts as above set forth, the taxpayer is entitled to have its excess profits tax liability allowed under provision of Section 328 of the said acts.

Wherefore the taxpayer respectfully prays that this Board will hear and determine this appeal.

Harry Schwartz, Counsel for Taxpayer, Woodward Building, Washington, D. C.

Duly sworn to by Robert S. Breyer. Jurat omitted in printing.

[fol. 14] EXHIBIT "A"

Copy

Treasury Department, Washington, D. C.

IT:E:SM:ACM:
D-24757-60D

Sept. 25, 1925.

Troy Motor Sales Company, 1056 Figueroa Street, Los Angeles Calif.

SIRS: An audit of your income and profits tax return for the fiscal year ended June 30, 1921, has resulted in the determination of a deficiency in tax of $6,139.88 as shown in Bureau letter dated August 14, 1925.

In accordance with the provisions of Section 274 of the Revenue Act of 1924, you are allowed 60 days from the date of mailing of this letter within which to file an appeal to the United States Board of Tax Appeals contesting in

[fols. 15-17] whole or in part the correctness of this determination.

Where a taxpayer has been given an opportunity to appeal to the United States Board of Tax Appeals and has not done so within the 60 days prescribed and an assessment has been made, or where a taxpayer has appealed and an assessment in accordance with the final decision on such appeal has been made, no claim in abatement in respect of any part of the deficiency will be entertained.

If you acquiesce in this determination and do not desire to file an appeal, you are requested to sign the inclosed agreement consenting to the assessment of the deficiency and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:E:SM:ACM: D-24756-60D. In the event that you acquiesce in a part of the determination, the agreement should be executed with respect to the items agreed to.

Respectfully, D. H. Blair, Commissioner, by J. G. Bright, Deputy Commissioner.

Now, December 5, 1929, the foregoing petition certified from the record as a true copy.

B. D. Gamble, Clerk U. S. Board of Tax Appeals. (Seal.)

[fol. 18] Before United States Board of Tax Appeals

Docket No. 11678

[Title omitted]

Petition—Filed February 6, 1926

The above-named taxpayer hereby appeals from the determination of the Commissioner of Internal Revenue set forth in his deficiency letter, bearing symbols IT:E:SM:60-D-HWG-C-803, dated December 12, 1925, and as the basis of its appeal sets forth the following:

1. The taxpayer is a Delaware Corporation with principal offices in Los Angeles, California.

2. The deficiency letter, a copy of which is attached hereto, was mailed to the taxpayer on December 12, 1925, and

pursuant to instructions contained therein, the taxpayer's appeal to this Board has been perfected within a period of sixty days, as provided by the Revenue Act of 1924.

3. The taxes in question are corporation income and excess profits taxes for the fiscal year ended June 30, 1920; the amount of the deficiency asserted against the taxpayer [fol. 19] is $7,489.25; the amount in controversy is the full amount of the deficiency.

4. The determination of tax contained in the said deficiency letter is based on the following error:

The Commissioner of Internal Revenue erroneously refused to allow the amount of the excess profits tax to be determined under the provisions of Sections 327 and 328 of the Revenue Act of 1918.

5. The facts upon which the taxpayer relies as the basis of its appeal are as follows:

The actual amount of invested capital used for the determination of excess profits tax in the said deficiency letter is exceedingly small and disproportionate to that employed by representative corporations engaged in a similar business.

The taxpayer was a party to a contract with the Nash Motor Company under which it was given an exclusive territorial agency for the sale of cars, which contract, although highly productive of income, was not included in invested capital by the Commissioner.

Due to a special financial arrangement, the corporation was given an unusually large credit which enabled it to transact a large volume of business on a small invested capital.

A great proportion of the income received by the taxpayer was derived from commissions received on a brokerage basis.

[fol. 20] The Commissioner of Internal Revenue has recognized the above-mentioned abnormalities of income and invested capital for prior years and has granted special relief for said prior years.

6. The taxpayer in support of its appeal relies on the following proposition of law:

Where the invested capital or income of a taxpayer is abnormal within the meaning of Section 327 of the Revenue

Act of 1918, as disclosed by facts above set forth, the taxpayer is entitled to have its excess profits tax liability determined under the provisions of Section 328 of the said Act.

Wherefore the taxpayer respectfully prays that this Board may hear and determine its appeal.

Harry Schwartz, Counsel for Taxpayer, Woodward Building, Washington, D. C.

Duly sworn to by W. A. Sellman. Jurat omitted in printing.

[fol. 21] Copy

Treasury Department, Washington.

Office of Commissioner of Internal Revenue

IT:E:SM:60-D.
HWG-G-803.

December 12, 1925.

Troy Motor Sales Company, 1056 South Figueroa Street, Los Angeles, California.

Sms: An audit has been made of your income and profits tax return for the fiscal year ended June 30, 1920, with the result that a deficiency in tax of $7,489.25 has been disclosed, as shown in the attached statement.

[fols. 22-25] In accordance with the provisions of Section 274 of the Revenue Act of 1924, you are allowed 60 days from the date of mailing of this letter within which to file an appeal to the United States Board of Tax Appeals contesting in whole or in part the correctness of this determination.

Where a taxpayer has been given an opportunity to appeal to the United States Board of Tax Appeals and has not done so within the 60 days prescribed and an assessment has been made or where a taxpayer has appealed and an assessment in accordance with the final decision on such appeal has been made, no claim in abatement in respect of any part of the deficiency will be entertained.

If you acquiesce in this determination and do not desire to file an appeal, you are requested to sign the inclosed agreement consenting to the assessment of the deficiency and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:E:SM:60-D-HWG-G-803. In the event that you acquiesce in a part of the determination, the agreement should be executed with respect to the items agreed to.

Respectfully, D. H. Blair, Commissioner, by ——
——, Assistant to the Commissioner.

Inclosures: Statements. Agreement—Form A.

———

[fol. 26] BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket Nos. 9345, 11678

[Title omitted]

AMENDED PETITION

I. The above named petitioner hereby petitions for a redetermination of the deficiencies set forth by the Commissioner of Internal Revenue in his notices of deficiencies covering the year ended June 30, 1920, dated December 12, 1925, and bearing symbols IT:E:SM:60D-HEG-C-803, and covering the year ended June 30, 1921, dated September 25, 1925, and bearing symbols IT:E:SM:ACM-D24706-60D, and as the basis of its amended proceeding, alleges as follows:

1. The petitioner is a Delaware corporation with principal offices in Los Angeles, California.

2. The notice of deficiency covering the year 1920, a copy of which is attached to the original petition, and marked Exhibit "A," was mailed to the petitioner December 12, 1925, and the notice of deficiency covering the year 1921, a copy of which is attached to the original petition and marked [fol. 27] Exhibit "B," was mailed to the petitioner September 25, 1925.

3. The taxes in controversy are corporation, income and profits taxes for the fiscal years ended June 30, 1920, and June 30, 1921, and the amount in controversy is $53,975.58.

4. The determination of tax as set forth in the said notices of deficiences is based upon the following errors:

(a) For each of the years in question, the Commissioner of Internal Revenue erroneously reduced the deduction for officers' salaries paid or incurred.

(b) For each of the years in question, the Commissioner of Internal Revenue erroneously refused to compute the profits tax liability under the provisions of Section 328 of the Revenue Acts of 1918 and 1921.

(c) In addition to the erroneous determinations of tax as above assigned, the Commissioner of Internal Revenue is, for each of the years in question, attempting to collect taxes heretofore assessed but not collected, the collection of which said taxes is now barred by the Statute of Limitations.

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

[fol. 28] (a) During each of the years in question the Commissioner of Internal Revenue reduced the salary of John J. Troy from $15,000.00 to $12,000.00, and that of H. J. Coger from $15,000.00 to $12,000.00. The said Troy and the said Coger were officers of the petitioner and were actively employed and devoted all their time to it during the years in question, and the salaries of each of the officers in the full sum of $15,000.00 were paid or incurred, and the said amounts represent reasonable compensations for services rendered within the meaning of Section 234(a) (1) of the Revenue Acts of 1918 and 1921.

(b) During each of the years in question the invested capital of the petitioner was abnormally low and abnormally low salaries were paid to officers.

For the year ended June 30, 1920, the net income, invested capital, and excess profits tax liability, as disclosed in the notice of deficiency, amounted to $300,447.41, $139,921.91 and $111,743.34, respectively. The net income is about 215% of the invested capital. The profits tax is about 37% of the net income and about 80% of the invested capital.

For the year ended June 30, 1921, the net income, invested cap-tal and profits tax liability, as shown in the 30 day letter

referred to in the notice of deficiency are $124,010.39, $234,196.67 and $35,889.14, respectively.

The abnormally low invested capital for each of the years in question is due to the fact that during these years the [fol. 29] petitioner was operating under a territorial contract with the Nash Motor Car Company, covering Southern California and Arizona and that due to a special arrangement with the Nash Motor Car Company, the petitioner was given unusual credit and was also given a preference in the shipment of cars, by reason of which the petitioner was able to operate largely on borrowed capital paid in (in advance of shipment of cars) by sub-agents and customers and on borrowed capital received from creditors, all of which borrowed capital the petitioner was able to operate on because of the fact that it was able to get shipments of cars and unusual credit arrangements, cars being in great demand and the petitioner's sub-agents and customers knowing that the petitioner, under its preferred arrangement with the Nash Motor Company, could procure cars where other agents could not. Sub-agents and customers deposited with the petitioner large sums of money in advance of the shipments of cars by reason of which the petitioner was able to operate largely on borrowed capital.

John J. Troy and H. J. Coger were President, General Manager, and Treasurer and owners of all of the capital stock. They devoted all of their time and efforts to the business, for which they were compensated in the amounts set forth above.

The profits tax liability for the years ended June 30, 1918, and June 30, 1919, was by the Commissioner of Internal Revenue determined under the provisions of Section 210 of the Revenue Act of 1917 and Section 328 of the Revenue [fol. 30] Act of 1918, as evidenced by the said Commissioner's letter dated July 14, 1923, a copy of which is attached hereto and made a part hereof and marked Exhibit "C."

(c) The total income and profits tax as stated in the petitioner's return was for the year ended June 30, 1920, in the amount of $122,924.50, which said amount was duly assessed on the September, 1920, list, account number 402411. The last quarterly installment of the tax in the sum of $30,731.11 has never been paid; no suit or other proceeding for

the collection of the tax has been begun; and no valid agreement has been entered into between the petitioner and the Commissioner of Internal Revenue, under which the unpaid balance can be collected after the expiration of the time allowed by law therefor.

For the year ended June 30, 1921, the petitioner duly filed its income and profits tax return within the time prescribed by law, which said return disclosed a total tax liability in the amount of $88,461.39, which said sum was assessed on the September, 1921, list, Account No. 402186. The last quarterly payment in the sum of $9,615.34, has not been as yet paid; no suit or other proceeding has been begun for its collection, and the petitioner and the Commissioner of Internal Revenue have entered into no valid agreement by which the running of the Statute of Limitations against the collection of the amount, has been waived.

[fol. 31] Wherefore the petitioner prays that this Board may hear the proceeding and determine that the full amount of salaries paid or incurred in the sum of $30,000.00, for each of the years in question, should be allowed as deductions; that the profits tax liability for each of the years in question be determined under Section 328 of the Revenue Acts of 1918 and 1921, and that pursuant to the authority contained in Section 906 (e) of the Revenue Act of 1926, that this Board determine that the outstanding assessments in the said sums of $30,731.11 and $9,615.34 cannot now be collected because barred by the Statute of Limitations, and that this Board grant such other and further relief as the premises justify.

Respectfully submitted.

Theodore B. Benson, 917 Southern Building, Washington, D. C., Counsel for Petitioner. J. Arthur Greenfield, 737 Citizens National Bank Bldg., Los Angeles, California.

Duly sworn to by W. A. Sellman. Jurat omitted in printing.

[fol. 32] EXHIBIT "C"

July 14, 1923.

Troy Motor Sales Company, 1056 South Figueroa St., Los Angeles, Calif.

SIRS: Reference is made to your income and profits tax returns for the fiscal periods ended December 31st, 1917, June 30, 1918, and June 30, 1919. The taxes for these periods have previously been determined as set forth in office letter of October 28, 1921, with the result that no excess [fol. 33] profits tax was assessed for the period ended December 31, 1917, and that the profits taxes for the fiscal periods ended June 30, 1918, and June 30, 1919, were determined under Section 328 of the Revenue Act of 1918.

From this determination of the tax you appealed to the Committee on Appeals and Review, particular exception being taken to the method of handling profits from "Lease Contracts" and also to the comparatives used in assessing the profits tax under Section 328. The Committee has carefully considered your case and sustained the action of the Unit in determining profits from lease contracts, advising however that certain comparatives used in computing the tax under Section 328 should be eliminated. Accordingly, the tax under Section 328 has been recomputed, the revised computation of the tax being shown below:

The tax for the year 1917 as shown in letter of October 28, 1921, is affirmed as previously assessed.

Computation of Tax—6 Months Ended June 30, 1918

Profits tax, Section 328			$10,618.83
Net income		$31,353.32	
Less:			
Profits tax	$10,618.83		
Exception	2,000.00		
		12,618.83	
Amount taxable at 12%		18,734.49	2,248.14
Total Tax assessable			12,866.97

[fol. 34]

Original assessment	1,385.87

3—38

No. 400,221, Additional assessment, December, 1921, Page 37, Line 9		13,923.58
Total assessment		15,309.45
Tax Liability		12,866.97
Overassessment		$2,442.48

Computation of Tax—Year Ended June 30, 1919

Profits tax, Section 328:		
1918 rates, 6 months		$16,133.21
1919 rates, 6 months		12,552.60
Total profits Tax		28,665.81
Net income	$93,599.74	
Less:		
Profits Tax	$28,665.81	
Exemption	2,000.00	
	30,665.81	
Amount taxable at 12%, 6 months	$62,933.93	3,776.04
Amount taxable at 10%, 6 months	62,933.93	3,146.70
Total tax assessable		$35,588.55
Original assessment (tentative return)		12,000.00
Additional assessment, Form 1120, No. 40080		32,171.31
Total		$44,171.31
[fol. 35] Less overassessment, October 14, 1921		4,071.34
Total assessment		$40,099.97
Tax Liability		35,588.55
Overassessment		$4,511.42

Respectfully, J. G. Bright, Deputy Commissioner.

Now, December 5, 1929, the foregoing amended petition certified from the record as a true copy.

B. D. Gamble, Clerk U. S. Board of Tax Appeals.
(Seal.)

BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket Nos. 9345 and 11678

[Title omitted]

ANSWER TO AMENDED PETITION—Filed May 31, 1927

The Commissioner of Internal Revenue, by his attorney, A. W. Gregg, General Counsel, Bureau of Internal Revenue, [fol. 36] for answer to the amended petition of the above-named taxpayer, admits, denies and alleges as follows:

1. Admits the allegations contained in paragraph 1 of the amended petition.

2. Admits the allegations contained in paragraph 2 of the amended petition.

3. Alleges that the taxes in controversy are in the amount of $7,489.25 for the fiscal year ending June 30, 1920, and in the amount of $6,139.88 for the fiscal year ending June 30, 1921.

5 (a). Admits that John J. Troy and H. J. Coger were officers of the petitioner and that their alleged salaries were reduced to $12,000, respectively.

5 (b). Admits that the Commissioner found for the year ended June 30, 1920, the net income, invested capital and excess profits tax liability of the petitioner to be $300,447.41, $139,921.91 and $111,743.34, respectively and for the year ended 1921, in the amounts of $124,010.30, $234,196.67 and $35,889.14, respectively. Admits that the Commissioner determined for the years ended June 30, 1918, and June 30, 1919, the tax liability of the petitioner as set forth in his letter to the taxpayer dated July 14, 1923.

5 (c). Admits that the petitioner filed its income tax returns for the year ending June 30, 1920, and June 30, [fol. 37] 1921, showing taxes due in the amounts of $122,924.50 and $38,461.39, respectively and that balances due on said taxes have not been paid.

Denies generally and specifically each and every allegation of fact contained in the petition not hereinbefore admitted, qualified or denied.

Wherefore it is prayed that the Commissioner's recommendation be approved and that the petition be dismissed and the appeal denied.

A. W. Gregg, General Counsel, Bureau of Internal Revenue. Of Counsel: Arthur H. Fast, Special Attorney, Bureau of Internal Revenue.

AHF:JJG:fem.

Now, December 5, 1929, the foregoing answer to amended petition certified from the record as a true copy.

B. D. Gamble, Clerk U. S. Board of Tax Appeals. (Seal.)

[fols. 38-40] Before United States Board of Tax Appeals

Docket Nos. 9345 and 11678

Troy Motor Sales Company, Petitioner,

vs.

Commissioner of Internal Revenue, Respondent

Promulgated December 4, 1928

Findings of Fact and Opinion

* * * * * *

[fols. 41-47] Findings of Fact

The petitioner, a Delaware corporation, with its principal office at Los Angeles, California, was organized in April, 1917, by John J. Troy, H. J. Coger and David H. Howie, to engage in the business of buying and selling automobiles and accessories in Southern California and in the State of Arizona. During the years involved in this proceeding, the petitioner was engaged in distributing Nash and Lafayette automobiles and accessories in the above mentioned territory.

* * * * * * *

[fols. 48-76] On September 15, 1920, the petitioner filed with the Collector of Internal Revenue for its district its

income and profits-tax return for the fiscal year ended June 30, 1920, and reported thereon a tax of $122,924.50, which amount was entered by the Collector on the September, 1920, list and appears on an assessment certificate signed by the Commissioner of Internal Revenue on November 8, 1920. The petitioner filed its return for the fiscal year ended June 30, 1921, on September 15, 1921, and reported thereon a tax of $38,461.39, which amount was entered by the Collector on the September, 1921, list and appears on an assessment certificate signed by the Commissioner on November 10, 1921.

* * * * * * * * *

[fol. 77] BEFORE UNITED STATES BOARD OF TAX APPEALS, WASHINGTON

Docket No. 9345

TROY MOTOR SALES COMPANY, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

ORDER OF REDETERMINATION

Pursuant to the Findings of Fact and Opinion of the Board promulgated December 4, 1928, the respondent in the above entitled proceeding filed a computation and notice with the Board on December 10, 1928, and an additional computation and notice on December 15, 1928. Copy of said notices were duly served on the petitioner together with notice of hearing. The case having been called for hearing on January 9, 1929, and further hearing being had thereon on January 31, 1929, the Board being fully advised in the premises, it is,

Ordered and decided upon redetermination that for the year ended June 30, 1921, there is a deficiency of $6,139.88 and in addition thereto an unpaid tax liability of $9,432.97.

(Signed) Charles M. Trammel, Member United States Board of Tax Appeals.

[fol. 78] Entered March 16, 1929.

Now, December 5, 1929, the foregoing order certified from the record as a true copy.

B. D. Gamble, Clerk U. S. Board of Tax Appeals.
(Seal.)

A true copy. Teste: B. D. Gamble, Clerk U. S. Board of Tax Appeals.

Before United States Board of Tax Appeals, Washington

Docket No. 11678

Troy Motor Sales Company, Petitioner,

vs.

Commissioner of Internal Revenue, Respondent

Order of Redetermination

Pursuant to the Findings of Fact and Opinion of the Board promulgated December 4, 1928, the respondent in [fols. 79-84] the above entitled proceeding filed a computation and notice with the Board on December 10, 1928, and an additional computation and notice on December 15, 1928. Copy of said notices were duly served on the petitioner together with notice of hearing. The case having been called for hearing on January 9, 1929, and further hearing being had thereon on January 31, 1929, the Board being fully advised in the premises, it is

Ordered and decided upon redetermination that for the year ended June 30, 1920, there is a deficiency of $7,489.25 and in addition thereto an unpaid tax liability of $30,731.11.

(Signed) Charles M. Trammell, Member United States Board of Tax Appeals.

Entered March 16, 1929.

Now, December 5, 1929, the foregoing order certified from the record as a true copy.

B. D. Gamble, Clerk U. S. Board of Tax Appeals.
(Seal.)

A true copy. Teste: B. D. Gamble, Clerk U. S. Board of Tax Appeals.

[fol. 85] BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket Nos. 9345; 11678

[Title omitted]

ORDER CHANGING NAME OF PROCEEDING—June 20, 1929

On motion of counsel for petitioner, and certified copy of certificate of amendment filed in the above proceeding, it is

Ordered that the name and style of this proceeding be and hereby is changed to read "Nash-Breyer Motor Co., formerly Troy Motor Sales Company."

(Signed) Benjamin H. Littleton, Member U. S. Board of Tax Appeals.

Dated Washington, D. C., June 20, 1929.

Now, December 5, 1929, the foregoing order certified from the record as a true copy.

B. D. Gamble, Clerk U. S. Board of Tax Appeals.
(Seal.)

[fol. 86] BEFORE UNITED STATES BOARD OF TAX APPEALS

B. T. A. Docket Nos. 9345 and 11678. No. Term, 192.

[Title omitted]

STIPULATION OF VENUE—Filed Aug. 2, 1929

It is hereby agreed and stipulated by and between the parties in the above entitled cause, by their respective attorneys, that the decision and orders of the United States Board of Tax Appeals in the said cause, dated the 16th of March, 1929, redetermining the amount of income and profits taxes of the said Troy Motor Sales Company for the fiscal years ending June 30, 1920 and June 30, 1921, may be reviewed by the United States Circuit Court of Appeals for the Second Circuit.

[fol. 87] This agreement is made under and pursuant to the provisions of Section 1002 of the Revenue Act of 1926.

Theodore B. Benson, Attorney for Petitioner. C. M. Charest, Attorney for Commissioner of Internal Revenue.

Dated this 17th day of July, 1929.

Now, December 5, 1929, the foregoing stipulation of venue certified from the record as a true copy.

B. D. Gamble, Clerk U. S. Board of Tax Appeals. (Seal.)

[fol. 88] In United States Circuit Court of Appeals for the Second Circuit

B. T. A. Docket Nos. 9345 and 11678. No. Term, 192.

Nash-Breyer Motor Co., Formerly Troy Motor Sales Company, Petitioner,

v.

Commissioner of Internal Revenue, Respondent.

Petition for Review—Filed Aug. 2, 1929

To the Honorable the Judges of the United States Circuit Court of Appeals for the Second Circuit:

Your petitioner, Nash-Breyer Motor Co., formerly Troy Motor Sales Company, is aggrieved by the decisions of the United States Board of Tax Appeals rendered on March 16, 1929, in the cases of Troy Motor Sales Company v. Commissioner of Internal Revenue, Nos. 9345 and 11678 on the docket of the said Board of Tax Appeals, the name and style of the causes having been changed to Nash-Breyer Motor Co., formerly Troy Motor Sales Company, and respectfully submits its petition for review thereof by the United States Circuit Court of Appeals for the Second [fol. 89] Circuit, the parties having agreed that the review shall be in this Court, as evidenced by a stipulation filed with the Clerk of the said Board.

I

Statement of the Case

1. On November 23, 1925, the petitioner filed with the United States Board of Tax Appeals, pursuant to the provisions of Section 274 of the Revenue Act of 1924, its petition for the redetermination of an alleged deficiency in income and profits taxes for the fiscal year ended June 30, 1921, in the amount of $6,139.88, as shown by a notice of deficiency previously mailed to the petitioner by the respondent under date of September 25, 1925. The allegations of the said petition insofar as material to the present proceedings are in substance as follows:

That the petitioner is a Delaware corporation having the principal place of business at Los Angeles, California; that the respondent on September 25, 1925, mailed to the petitioner a notice of deficiency showing a deficiency in income and profits taxes for the fiscal year 1921, in the amount of $6,139.88; that the income and capital of the petitioner were affected by abnormal conditions and that the profits tax should be determined under the provisions of Sections 327 and 328 of the Revenue Acts of 1918 and 1921.

2. Thereafter and on December 17, 1925, the respondent filed with the said Board his answer to the said petition, [fol. 90] which answer admitted that the petitioner is a Delaware corporation and that it maintained its principal office at Los Angeles, California; that the respondent on September 25, 1925, mailed to the petitioner a notice of deficiency showing a deficiency in the said amount of $6,139.88; and that the respondent had refused to determine the profits tax under the provisions of Sections 327 and 328, but denied that this was error.

3. On February 6, 1926, the petitioner likewise filed with the said Board of Tax Appeals its petition for the redetermination of an alleged deficiency in income and profits taxes for the fiscal year ended June 30, 1920, in the amount of $7,489.25, as shown by a notice of deficiency previously mailed to the petitioner by the respondent under date of

December 12, 1925. The allegations of the said petition insofar as material to the present proceedings are in substance as follows:

That the petitioner is a Delaware corporation having its principal place of business at Los Angeles, California; that the respondent on December 12, 1925, mailed to the petitioner a notice of deficiency showing a deficiency in income and profits taxes for the fiscal year 1920, in the amount of $7,489.25; that the income and capital of the petitioner were affected by abnormal conditions and that the profits tax should be determined under the provisions of Sections 327 and 328 of the Revenue Act of 1918.

4. Thereafter and on March 27, 1926, the respondent filed [fol. 91] with the said Board his answer to the petition and admitted that the petitioner is a corporation organized and existing as alleged and that it maintained its principal office at Los Angeles, California; that the respondent on December 12, 1925, mailed to the petitioner a notice of deficiency showing a deficiency in income and profits taxes in the amount of $7,489.25; and that the respondent had refused to determine the profits tax under the provisions of Sections 327 and 328, but denied that this was error.

5. On May 14, 1927, the petition filed with the said Board a motion for leave to consolidate and amend its petitions theretofore filed, which motion was by the said Board granted on May 17, 1927, and an amended petition was on that date filed. The allegations of the said amended petition insofar as material to the present proceedings are in substance as follows:

That the petitioner is a corporation as alleged and that the said notices of deficiency were mailed as alleged in the original petitions; that during each of the years in question there was credited on the books of the petitioner as salaries duly authorized the sum of $15,000.00 to each of the two officers; that the respondent in determining the deduction for compensation for services under the provisions of Section 234 (a) (1) of the Revenue Acts of 1918 and 1921, erroneously reduced the amount thereof to $12,000.00 to each of the said officers; that during each of the said years the capital and income of the petitioner were affected by abnormal conditions within the meaning of Section 327 of

the Revenue Acts of 1918 and 1921 and that the profits tax [fol. 92] should be determined in the manner provided in Section 328 of the said Acts; that the petitioner on September 15, 1920 filed its return of income and profits taxes for the fiscal year 1920 and reported therein as such taxes the sum of $122,924.50 and on September 15, 1921 filed its return for the fiscal year 1921 and reported therein as such taxes the sum of $38,461.39; and that the last quarterly installment of tax for the year 1920 in the amount of $30,731.11 and the last quarterly installment for the year 1921, in the amount of $9,615.33 have not been collected; and that the time within which the respondent could legally collect the said sums had expired.

6. Thereafter and on May 31, 1927, the respondent filed with the said Board his answer to the said consolidated and amended petition which answer alleged that the tax in controversy for the year June 30, 1920, was $7,489.25 and for the year June 30, 1921, $6,139.88; admitted that the respondent reduced the salaries of the two officers to $12,000.00 each; that the respondent refused to determine the profits tax liability under the provisions of the said Sections 327 and 328 and that there was reported in the return for the year ended June 30, 1921, the sum of $38.461.39; and denied all allegations of fact not specifically admitted.

7. The causes being at issue under the rules of practice of the said Board on the filing of the said answer to the said amended petition, duly came on for hearing March 19, 1928, at which time the petitioner by competent witness of-[fol. 93] fered testimony in support of the allegations of its amended petition as aforesaid and the cause was argued and submitted.

8. Thereafter and on December 4, 1928, the Board rendered its findings of fact and opinion in the cause. The said Board found that the salaries credited to each of the said officers in the amount of $15,000.00 were not paid or incurred; that neither the capital nor income was affected by abnormal conditions and that the statute of limitations had not run against the right of the respondent to collect the unpaid balance of the tax reported in the return for the year 1920 in the amount of $30,731.11 and reported in the return for the year June 30, 1921 in the amount of $9,432.97,

9. On January 9, 1929, the petitioner moved the Board to reconsider its opinion and pursuant to an order of the Board entered on the same day the motion came on for hearing January 31, 1929, and the Board by order dated February 7, 1929, denied the petitioners motion for reconsideration.

10. On March 16, 1929, the said Board entered a final order of redetermination for each of the years under consideration redetermining a deficiency for the year 1920 in the amount of $7,489.25, and stating, in addition thereto, an unpaid tax liability of $30,731.11, and for the year 1921 redetermining a deficiency in the amount of $6,139.88, and stating, in addition thereto an unpaid tax liability in the amount of $9,432.97.

[fol. 94] 11. On June 18, 1929, the petitioner by motion sugested to the Board that on March 8, 1928, its charter was amended and its name changed from Troy Motor Sales Company to Nash-Breyer Motor Co., and prayed that the name and style of Docket Nos. 9345 and 11678 be changed to Nash-Breyer Motor Co., formerly Troy Motor Sales Company, which said motion was granted by the Board June 20, 1929.

II

Assignments of Error

Your petitioner believes and avers that errors were committed by the Board, to its damage and prejudice, as shown by the following:

1. The Board erred in entering judgment for the respondent on each of the issues raised on the amended petition.

2. The Board erred in redetermining the deficiencies as found by the respondent.

3. The Board erred in holding that the amounts of certain salaries properly credited to officers on the books of the petitioner were neither paid nor incurred and were not deductible from income.

4. The holding of the Board that the said salaries so credited to the officers of the petitioner were not deductible

from income is contrary to the evidence and is without evidence to support it.

[fol. 95] 5. The Board erred in refusing to hold in accordance with the evidence that the said salaries were properly credited to the said officers in the manner defined in Section 300 of the Revenue Acts of 1918 and 1921.

6. The Board erred in holding that neither the capital nor the income of the petitioner was affected by abnormal conditions within the meaning of Section 327 of the Revenue Acts of 1918 and 1921.

7. The holding of the Board that neither the capital nor the income of the petitioner was affected by abnormal conditions is unsupported by and is contrary to the evidence.

8. The Board erred in refusing to hold in accordance with the evidence that the capital of the petitioner was affected by abnormal conditions within the meaning of the said Section 327.

9. The Board erred in refusing to hold in accordance with evidence that the income of the petitioner was affected by abnormal conditions within the meaning of said Section 327.

10. The Board erred in excluding from evidence a document offered in evidence as petitioners Exhibit No. 7, entitled "A Certificate of Overassessment" covering the year ended June 30, 1919, and showing that the respondent found that for the first six months of the calendar year 1919 the capital and income of the petitioner were affected by abnormal conditions, which said six months fell within [fol. 96] the same calendar year as the first six months of the petitioner's fiscal year ended June 30, 1920.

11. The Board erred in holding that it has jurisdiction to determine that the statute of limitations has not run against the right of the respondent to collect assessments, made during the years 1920 and 1921, of amounts reported on the original returns filed by the petitioner, which said amounts were not deficiencies as defined by Section 273 of the Revenue Acts of 1924 or 1926.

12. The Board erred in holding that the provisions of Section 278 (d) of the Revenue Acts of 1924 and 1926 pro-

vided the time within which the tax assessed on the original returns filed by the petitioner may be collected.

13. The Board erred in refusing to hold that the time within which the tax assessed on the original returns and during the years 1920 and 1921, can be collected is the five-year period as defined in Section 250 (d) of the Revenue Act of 1921.

14. The Board erred in holding that the running of the statute of limitations against the right of the respondent to collect the assessment made on the original returns was revived by the filing of the petitions with the said Board.

15. The Board erred in holding that the running of the statute of limitations against the right of the respondent to [fol. 97] collect the assessments made on the returns was suspended by the filing of the petitions.

16. The Board erred in admitting in evidence over the objections of the petitioner certain documents entitled "Income and Profits Tax Waiver" and bearing date of December 21, 1927, and offered in evidence as respondent's Exhibit "L" and "M", which said documents were delivered to the Collector of Internal Revenue on December 23, 1927, on which said date the petitioner wrote a letter to the said Collector qualifying the said documents, which said letter was delivered to and was in the possession of the said Collector before the said documents were accepted or signed by the Commissioner of Internal Revenue or anyone on his behalf.

17. The Board erred in refusing to admit in evidence the said letter dated December 23, 1927, offered by the petitioner as Exhibit "25."

18. The Board erred in admitting in evidence over the objection of the petitioner a document entitled "Income and Profits Tax Waiver" dated December 16, 1926, which said document was not signed by either of the parties named in the body thereof.

19. The Board erred in entering its orders of redetermination in that the same are indefinite and meaningless and do not conform to the opinion promulgated and the petitioner is not appraised of its rights and liabilities thereunder.

[fol. 98] 20. In its orders of redetermination the said Board erred in ordering and deciding that for the year June 30, 1920, there is an unpaid tax liability of $30,731.11 and for the year June 30, 1921, an unpaid tax liability of $9,432.97. In entering its orders of redetermination the Board exceeded the jurisdiction conferred upon it by the Revenue Act of 1926 to redetermine a deficiency.

21. Having assumed jurisdiction the Board erred in refusing to hold that the statute of limitations had run against the rights of the respondent to collect the amounts of assessments made during the years 1920 and 1921.

Wherefore your petitioner prays that the decisions of the Board of Tax Appeals entered herein against it be reviewed by this Honorable Court and for such other and further relief as the Court may deem meet and proper in the premises.

Nash-Breyer Motor Company, Formerly Troy Motor Sales Company, by (Sgd.) Theodore B. Benson, Attorney.

City of Washington,
District of Columbia, ss:

Theodore B. Benson, being duly sworn deposes and says that he is attorney for petitioner, that he knows the contents of the foregoing petition, that to the best of his knowl-[fol. 99] edge and belief the statements therein are true, and that the assignments of error are well taken and intended to be argued.

(Sgd.) Theodore B. Benson.

Subscribed and sworn to before me this 29th day of July, 1929.

Beryl W. Roberts, Notary Public, D. C.

Before United States Board of Tax Appeals

Notice of Petition for Review—Filed Aug. 2, 1929

To General Counsel, Bureau of Internal Revenue, Attorney for Respondent:

You are hereby notified that on the 21 day of August, 1929, a petition for review of the decisions of the United

States Board of Tax Appeals was filed with the Clerk of the Board in the case of Nash-Breyer Motor Co., Formerly Troy Motor Sales Company, vs. the Commissioner of Internal Revenue, Docket Nos. 9345 and 11678 and a true copy of said petition is herewith served upon you.

Theodore B. Benson, Attorney for Petitioner.

[fols. 100-171] Receipt of the above petition acknowledged this 2d day of August, 1929.

C. M. Charest, General Counsel, Bureau of Int. Rev., Attorney for Respondent.

Now, December 5, 1929, the foregoing petition for review, notice of filing and proof of service certified from the record as a true copy.

B. D. Gamble, Clerk U. S. Board of Tax Appeals. (Seal.)

[fol. 172] Before United States Board of Tax Appeals

B. T. A. Docket Nos. 9345 and 11678. No. —

[Title omitted]

Præcipe for Transcript of Record—Filed Nov. 27, 1929

To the Clerk of the United States Board of Tax Appeals:

You will please prepare and, within sixty days and such additional time as has been granted by the Board, from the date of the filing of the petition for review in the above-stated case, transmit to the clerk of the United States Circuit Court of Appeals for the Second Circuit, certified copies of the following documents:

1. The docket entries of proceedings before the United States Board of Tax Appeals in the above entitled cause.

2. Pleadings before the Board: Petitions and Answers and Amended Petition and Amended Answer.

[fol. 173] 3. Findings of fact, opinion, decision of the Board.

4. Motion for Reconsideration, Board Orders dated January 9, 1929 and February 7, 1929.

5. Motion filed December 10, 1928, by respondent and Notice of Settlement and computation attached thereto dated December 15, 1928.

6. Two (2) Board Orders of Redetermination dated March 16, 1929.

7. Motion with Certificate of Amendment attached filed June 18, 1929, and Board Order dated June 20, 1929, changing name and style of proceeding.

8. Stipulation for Review by the United States Circuit Court of Appeals for the Second Circuit.

9. Petition for Review.

10. Statement of Evidence settled or agreed upon.

11. This præcipe.

The foregoing to be prepared, certified, and transmitted as required by law and the rules of the United States Court [fol. 174] of Appeals for the Second Circuit.

Theodore B. Benson, Attorney for Petitioner on Review. C. M. Charest, General Counsel, Bureau of Internal Revenue, Attorney for Respondent.

Now, December 5, 1929, the foregoing præcipe certified from the record as a true copy.

B. D. Gamble, Clerk U. S. Board of Tax Appeals.
(Seal.)

[fol. 175] In United States Circuit Court of Appeals for the Second District, October Term, 1929

No. 251

Argued May 12. 1930. Decided June 9, 1930

Nash-Breyer Motor Co., Formerly Troy Motor Sales Co., Petitioner,

v.

Commissioner of Internal Revenue, Respondent

Appeal from the United States Board of Tax Appeals

Before L. Hand, Augustus N. Hand, and Chase, Circuit Judges

Petition to review a decision of the Board of Tax Appeals fixing the petitioner's income and profits tax for the years ending June 30, 1920 and 1921.

Arthur H. Deibert, of Washington, D. C., for petitioner.

John Vaughan Groner, of Washington, D. C., for respondent.

OPINION

PER CURIAM:

This petition must be dismissed for lack of jurisdiction for the reasons given in Massachusetts Fire & Marine Insurance Co. v. Commissioner, 40 F. (2d) —, handed down herewith. The facts are the same, except that the petitioner is a Delaware corporation, which filed its return in California. The case is a more striking illustration of the possible consequences. We should have to find very solid reasons for supposing that Congress intended to impose upon us at the will of the parties a controversy which for obvious reasons properly belongs either in the Ninth circuit, or in the District of Columbia. We can repeat here as well, however, that in fact the petitioner has suffered nothing from dismissal.

Petition dismissed for lack of jurisdiction.

[fol. 176] IN UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

NASH-BEZYER MOTOR CO., Formerly Troy Motor Sales Co., Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Appeal from the United States Board of Tax Appeals

JUDGMENT—Filed June 16, 1930

This cause came on to be heard on the transcript of record from the United States Board of Tax Appeals and was argued by counsel.

On consideration whereof it is now hereby ordered, adjudged, and decreed that the appeal from said United States Board of Tax Appeals be, and it hereby is, dismissed for lack of jurisdiction.

It is further ordered that a Mandate issue to the said Board in accordance with this decree.

Wm. Parkin, Clerk.

[fol. 177] [File endorsement omitted.]

[fol. 178] In United States Circuit Court of Appeals, Second Circuit

[Title omitted]

Order Amending Mandate—Filed July 16, 1930

Upon application of counsel for the Petitioner it is

Ordered that the mandate of this court heretofore issued herein be and hereby is recalled and amended by adding the words to the ordering clause in said mandate "but without prejudice to any further proceedings before the Board of Tax Appeals to bring the review before the proper United States Circuit Court of Appeals".

Wm. Parkin, Clerk.

[fol. 179] [File endorsement omitted.]

[fol. 180] Clerk's certificate to foregoing transcript omitted in printing.

[fols. 181 & 182] In Supreme Court of the United States

Order Extending Time Within Which to Apply for Writ of Certiorari—Filed Sept. 12, 1930

On consideration of the motion of counsel for petitioner in the above entitled cause, and good cause therefor having been shown,

It is now here ordered that the time within which petition for writ of certiorari may be filed herein be, and the same is hereby, extended for a period of 60 days from September 16, 1930.

Charles E. Hughes, Chief Justice of the United States.

Dated this 12th day of September, 1930.

[fol. 183] [File endorsement omitted.]

[fol. 184] In Supreme Court of the United States

Stipulation as to Parts of Record to be Printed—Filed Nov. 8, 1930

Counsel for petitioner and respondent hereby stipulate and agree that the following parts only of the record in

the Circuit Court of Appeals for the Second Circuit, shall be printed as the record in this Court on application for writ of certiorari:

1. Docket entries, No. 9345, pages 1-5.
2. Docket entries, No. 11678, pages 6-10.
3. Petition, No. 9345, pages 11-15.
4. Petition, No. 11678, pages 18-22.
5. Amended Petition, page 26 to middle of page 35.
6. Answer to Amended Petition, middle of page 35 to middle of page 37.
7. Findings of Fact Board of Tax Appeals, page 41, lines 5 to 14 inclusive and page 48, lines 8 to 22 inclusive.
8. Order of Redetermination, No. 9345, page 77 to middle of page 78.
9. Order of Redetermination, No. 11678, middle of page [fol. 185] 78 to bottom of page 79.
10. Order entered June 20, 1929, page 85.
11. Stipulation of Venue, pages 86-87.
12. Petition for Review, pages 88-99.
13. Notice of Service, middle of page 99 to middle of page 100.
14. Præcipe, pages 172 to 174 inclusive.
15. Decision of United States Circuit Court of Appeals for the Second Circuit, dated June 9, 1930.
16. "Order for Mandate" of the United States Circuit Court of Appeals for the Second Circuit, dated June 16, 1930.
17. "Order" recalling and amending "Order for Mandate" of the United States Circuit Court of Appeals for the Second Circuit, dated July 16, 1930.
18. The Verification of the Record by the Clerk of the United States Circuit Court of Appeals for the Second Circuit.
19. Order extending time within which to apply for writ of certiorari.
20. This Stipulation

Theodore B. Benson. Theodore B. Benson, Counsel for Petitioner. Thomas D. Thacher, Solicitor General of the United States, Counsel for Respondent.

[fol. 186] [File endorsement omitted.]

Supreme Court of the United States

Order Allowing Certiorari—Filed January 5, 1931

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.